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MARY GYPE
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IN THE COURT OF COMMON PLEAS OF FULTON COUNTY, OHIO

Stammco, LLC, et al,	*	
Plaintiffs,	*	Case No. 05CV000150
-vs-	*	
United Telephone Co. of Ohio, et al,	*	**JUDGMENT ENTRY**
Defendants.	*	

* * * * *

Coming on before the Court is Plaintiffs' Motion for an Order Certifying a Class, Designating Plaintiffs as the Class Representative, and Appointing Plaintiffs' Counsel, as Class Counsel, for a Proposed Class Action, filed under seal on April 20, 2007; Defendants' Brief in Opposition, filed under seal on June 18, 2007; Plaintiffs' Reply Brief filed under seal on July 2, 2007; Defendants' Surreply Brief filed July 24, 2007; Plaintiffs' Motion to Strike Defendants' Surreply Brief, filed July 27, 2007; Plaintiffs filing of the Supplemental Authority of Ritt v. Billy Blanks Ents, 171 O. App. 3d 204; Defendants' Response to Plaintiffs' Submission of the Supplemental Authority, filed September 5, 2007; and Plaintiffs' Reply to the Response of Sprint, filed September 13, 2007.

The facts in this case are as follows:

The Defendants, United Telephone Company of Ohio (hereafter "UTO"), and Sprint Corporation (hereafter "Sprint"), did and still do provide local and long distance telephone service to more than one million customers throughout Ohio, including Plaintiffs. In 2004 UTO was a wholly owned subsidiary corporation of Defendant "Sprint." It then reorganized and became "Sprint-Nextel Corporation," and now is reorganized as "Embarq." For identification purposes Defendants will be referred to as "UTO" or "Sprint."

Billing activities for UTO, and for all of the other local telephone companies that are part of the Sprint network, are processed centrally through a system managed by what is now known as Embarq Management Company. The process of billing for the services provided by these local telephone companies is the same for all subsidiaries of Sprint. This process was and is managed solely through a system of computerized procedures, and they have not changed during the relevant time period.

In addition to billing its own customers for the telephone services provided directly by Sprint subsidiaries, including UTO, Sprint has also entered into contracts with a number of other unrelated third parties, for the purpose of providing billing services for sundry items and services rendered by and on behalf of these other contracting third parties, and it bills its own customers on behalf of these unrelated third party entities, per contract. The procedure for the billing of these items and services, on behalf of these unrelated third parties entities, has also remained the same over the requisite time period.

Plaintiffs claim that a number of these third party entities, hiding behind tiers of billing agents, electronic billing systems, and billing telephone companies, have become successful in collecting large sums of monies from Defendants' customers, by having or causing unauthorized, misleading, and deceptive charges to be placed on Defendants' customers' telephone bills. These unrelated charges are billed and collected by the local telephone company from its own customers, for items or services allegedly provided by these unrelated companies and businesses. Some of these third party billings are transparent, authorized, and legitimate. Some are not. To the extent such services are bogus, or unauthorized, Plaintiffs claim they constitute a fraud upon themselves, the public, and upon the proposed "Class."

The practice of causing these unauthorized charges to be placed on a customer's telephone bill is recognized in the industry as "cramming." "Cramming" has been recognized and acknowledged to be a serious problem by other States, and by the telecommunications industry itself. As and for remedy, a number of these other States have enacted remedial legislation, thereby protecting their own citizens from these same types of predatory practices, known to have affected Ohio's citizens and the proposed Class Members in this case, or they have referred the matter over to litigation. (The Court notes an action was recently brought by the Federal Trade Commission against OAN, Integretel, Nationwide Connect, and Access One, in the U.S. District Court for the Southern District of Florida, which addresses the issue facing this Court in this proceeding.) These other jurisdictional actions and protections clearly demonstrate: (a) that Sprint is aware of the significance of the problem; (b) that Sprint has the technology to prevent cramming abuses; and (c) that Sprint has failed to give its Ohio customers the same minimal protections it has been able to provide, and does provide, to its customers in other States or jurisdictions.

To describe the structure of the scheme, as best can be determined, Sprint enters into various contracts with numerous third-party toll service providers, and with large billing clearinghouses. A billing clearinghouse, or "billing aggregator," is a company which will bill on behalf of a large number of other entities. Again, various tiers and insulators are built into the system. In these contracts, Sprint agrees to perform billing and collection services for these various clients, who "subscribe to" and "purchase" these services from Sprint, in accordance with the terms of their various agreements with Sprint. All of these third party agreements are substantially similar in general terms, procedures, and execution, although a number of variables, including the length of contract, the specific rate to be charged by Sprint for these services, the amount of reserves to be held by Sprint for uncollectible accounts and billing adjustments, and the minimum revenue commitments, will vary with each third party entity, based upon the anticipated billing volume, and the collection history of each client. The general format umbrella and terms included in these agreements, however, have not changed over the past ten years, and it is the "general nature" of the format, affecting all of Sprint's customers, sans the "variables," that constitutes the basis for the proposed "class action."

With respect to the instant lawsuit, Plaintiffs Kent and Carrie Stamm own and operate a small business in Archbold, Ohio, named Stammco, LLC, d/b/a/ "The Pop Shop." They provide small-town retail services for a limited number of customers in semi-rural Fulton County, Northwest Ohio. They are not "well-heeled" by any means, but they do know how to use a computer, and the telephone is a necessary component of their business. In the course of a review of their business records, Plaintiffs discovered there were numerous unauthorized charges being billed by Sprint, on behalf of several third parties, which were included on their monthly phone bills. At least one of these charges was not even discovered, nor recognized by Plaintiffs, as an unauthorized charge, until long after payment had been made by them to Sprint. It is of further note that another unauthorized charge, brought to Mr. Stamm's attention by counsel for Sprint during Plaintiff Stamm's deposition, was never discovered by Mr. Stamm until he was in the process of reviewing his records in preparation for his deposition, the day before. Mr. Stamm is also acutely aware of a large number of other Sprint customers, from his locality, who were and are being billed for unauthorized charges, by the Defendants, on behalf of third party entities. Defendants have since "reversed" these charges out, and they now claim that since Plaintiffs have not actually had to pay the "unauthorized" charges, they have not been actually damaged. There being no damages, Defendants now assert Plaintiffs have no "standing" to bring the instant suit. Plaintiffs deny this claim, and they assert some of the unauthorized charges were never reimbursed nor recovered, all to their damage and standing, and that they suffered other damages in the form of time and effort.

Plaintiff, The Pop Shop, received a Sprint telephone bill in October of 2004, which included unauthorized charges of $87.98, billed by OAN Services, Inc., "billed on behalf of Bizopia." Plaintiff Kent Stamm had no knowledge of any services provided by Bizopia for the Pop Shop. After making a number of phone calls, and after sending a number of e-mails to Bizopia, Mr. Stamm was finally able to discover that Bizopia was alleged to be a web site building and hosting service. He also learned it had a most unsatisfactory record with the Better Business Bureau. In addition, when The Pop Shop did not make immediate payment to Sprint, after disputing the unauthorized charge on the monthly telephone bill, Sprint added a $10.00 late fee to its next month's bill. Mr. Stamm was not pleased with the charge, nor with the penalty charge, and he was not especially pleased with the inordinate amount of time and energy he had to devote to running down the facts, which finally led to the filing of the instant lawsuit.

Mr. Stamm had not been aware that Sprint would be billing him on behalf of other third party entities. This prospect was never conveyed to him by Sprint when he entered into his telephone service agreement with Sprint. In fact, Plaintiffs specifically requested, on several occasions, that no third-party billing be placed on The Pop Shop's local telephone bill. Nevertheless, and in total disregard to Plaintiffs' instructions, the third–party billings by Sprint continued. Mr. Stamm eventually learned that Sprint would not allow him to "block," or indicate in any way, that he did not want any third party billings on his account. Significantly Sprint does not require any written authorization from its customers before it places third-party charges on its own customer's local telephone bills.

Plaintiffs assert that Defendants, being regulated public utilities, are required to provide and bill for telephone services which are actually rendered, that Sprint has a duty to ensure that the bills it sends to its customers are accurate, and that the funds collected in payment of those bills are for products and services actually authorized and received by its customers. Plaintiffs assert Sprint has effectively entered into a "de facto" partnership or agency relationship with its third party vendors, and that it has failed to properly utilize effective methods to screen these third party vendors, and the practices of these third party vendor billing entities, all to Plaintiffs' damage. Plaintiffs allege Sprint has and continues to engage in negligent and/or fraudulent conduct by negligently and/or fraudulently including charges for unauthorized products and services on the bills it sends to its customers, and that this negligence/fraud has caused Sprint's customers to be billed for, and in many instances, to pay for, services and merchandise they did not want, authorize, or even receive. Plaintiffs assert that those particular items which would generate a large amount of money, placed on a customer's phone bill, would probably be spotted by the customer, and maybe challenged, but that many of these unauthorized charges are for only a few dollars, and being so small, they either go unnoticed, as happened to Mr. Stamm for a long time, or they constitute such a small amount of fraud, that it is and would be hugely uneconomical to attempt to track them down, challenge them, and seek redress. It's a lot cheaper for the customer to just pay and shut up.

A challenge to any "unauthorized" charge is not easy, and it's time consuming. Customer service is handled by Sprint representatives in centralized offices. These customer service representatives deal with all Sprint local telephone customers, including subscribers served by the United Telephone Company of Ohio. Information pertaining to any proposed change to a customer's bill is relayed to the Defendants' customer service representatives, through project program managers, who are employees of Embarq [formerly Sprint], and they deal with all of the local telephone companies that provide services under the Embarq name. The manner is which these Sprint representatives handle the customers' complaint or request for information is standardized, and the manner in which the call is "escalated" to other representatives, with more training and experience, when more sophisticated assistance is needed in handling the call to attempt a resolution, is uniform. This multi-tiered system is often electronic, and it soon becomes daunting, uneconomical, and ultimately frustrating to the average lay person. Once the unresolved issue comes to the "service recovery center" where customer escalations are handled, there is also a standardized procedure for dealing with complaints regarding billing problems. However, if the complaint remains unresolved at that level, there is no further step in the process for the customer to take, short of litigation.

Guidelines on how to handle customer inquiries, and how to arrange for "credits," are made available to Sprint's representatives in an online "job handbook." This handbook describes a uniform call handling process and provides instructions on how and/or when to issue credits. In every instance, Sprint representatives who handle customer complaints, pertaining to third party charges, are instructed to inform all such customers that they need to contact the third party vendor to resolve the issue, and that Sprint will not handle the complaint.

Thus, if a customer does notice he has an unauthorized third party charge on his telephone bill, he must first contact the third party vendor to dispute the charge. As a standardized term in every billing agreement, a customer's call to Sprint with a complaint pertaining to a third party charge results in the customer being referred back to the third party who originated the charges. If that third party is a billing clearinghouse, the customer will then be required to take another step in the process, and he will be referred on to the vendor who actually placed the original charge with the clearinghouse. It is only after a customer refuses to deal with the third party, or calls Sprint back after having been unsuccessful in resolving the dispute with the third party clearinghouse, or with the third party vendor, that Sprint might authorized a credit on the customer's bill. Although a credit adjustment on the phone bill can be authorized by a customer service representative, in actual practice the outcome is variable, and it depends upon what the customer has expressed to the Sprint representative, and which Sprint representative happens to take the call. There is an actual adjustment code in the account representative handbook which deals specifically with making credit adjustments resulting from complaints of third party "cramming."

If the third party vendor authorizes a credit on the customer's local telephone bill, or if a Sprint representative decides to give the customer a credit for the charges, Sprint is paid for the inclusion of this additional line item, the credit, on the customer's bill, just as they were paid for the original charge on the account. This is in addition to other set fees paid by the third party to Sprint for the various billing and collection services that Sprint provides. In actuality the billing disputes have the effect of generating additional revenues for Sprint, and additional headaches for its customers.

Sprint is well aware of the "cramming" problem, and of the potential for abuse in these billing arrangements. Terms are typically inserted in the standard billing and service agreements which allow Sprint to hold back reserves from the billing entities, such as billing clearinghouses, known as "CICs." These terms further allow Sprint to increase the amounts of those deposits, and/or to increase the transaction processing rates, all based upon the number of complaints received, and the number of adjustments made to its customer accounts. Sprint also reserves the right to deny billing and collection services to any entities billing through a billing clearinghouse, referred to as "subCICs," that Sprint deems to be harmful to its end user customers, or to Sprint's reputation. There have been over fifty of these subCIC billing entities terminated by Sprint in the last ten years due to the number of complaints received, or in response to potential State and Federal litigation. Although the decision to terminate the billing for a subCIC, by the team tasked to manage the third party billing, may actually come after a review of the monthly complaint reports, and after attempting to verify the billing authorizations with the billing clearinghouse, even then no further followup will be conducted by Sprint, even after the CIC entity has been notified by Sprint that it will no longer be processing its bills.

Sprint does have the ability to "block" such third party vendor charges. In fact, this service is currently being provided to local telephone customers in some other states, but it is being denied to customers in Ohio. Presumably, these only states, where Sprint does provide "third party billing blocks," are those states where it has been obligated to do so by legislative mandate or court rule.

Sprint does not allow its local telephone customer in Ohio to initiate a "third party block." Although Mr. Stamm was told at one time that Sprint would block these charges for him, he was later informed that this option would not be available to Plaintiffs or any of its Ohio customers. Thus every customer of United Telephone Company of Ohio, similarly situated, must submit to the prospect of having these charges appear on his or her phone bill without the necessity of any authorization being required, and he or she is forced to endure Sprint's protracted dispute resolution process before any unauthorized charges may be taken off his or her bill, assuming the customer were to even notice the charge in the first place. Many customers simply choose to pay these bills, rather than go through an exhaustive and time consuming process. Unlike customers in those other states where Sprint provides "third party blocking" as a service to prevent this type of billing, every telephone customer of Sprint in Ohio is subject to being billed for third party charges without any alternative to avoid it. This "universality of un-avoidance" is in essence the basis for Plaintiffs' assertion that class action certification is the only realistic remedy, for what Plaintiffs' assert is a fraud upon then the public, and upon the prospective "class."

Plaintiffs have alleged three alternative causes of action: (1) Sprint's "negligent billing," on behalf of third party entities, has caused harm to the Plaintiff class, through the disregard and misuse of the relationships established by Sprint, and with those to whom it provides telephone service; (2) A breach of the "implied duty of good faith in contract," by Sprint's taking opportunistic advantage of the Plaintiff class; and/or (3) That Sprint has been "unjustly enriched" by its third party billing practices, and it is inequitable for Sprint to retain these profits. Plaintiffs seek to have this action certified as a class action on behalf of all Sprint customers similarly situated, and Plaintiffs have asked this Court for injunctive relief to prevent Sprint from continuing these unauthorized billing practices.

Plaintiffs further claim that Defendants have been, and continue to be, either directly, or as agents, negligent in violating their duty to provide accurate billings to their customers, and in the facilitating of a fraud upon their customers. Plaintiffs further assert that the amounts involved are so small, that they usually avoid detection by most customers, and if noticed, the costs and red tape associated with getting a charge reversed, are so overbearing and ponderous, that in actuality, the customer, on an individual basis, has no realistic alternative avenue of redress.

Defendants assert Plaintiffs do not meet the criteria for class certification.

First, Defendants assert that most "third party service" contracts are a result of transactions negotiated by and between the service provider and the end-user, and not by or with the Defendants. The third party services for which UTO delivers charges cover a wide range of products and services, including long-distance telephone service, pay-per-call information services, such as weather, sports, website setup and hosting, on-line advertising, and music "downloading." In Ohio, UTO receives charges for delivery by and from multiple clearinghouses, and those charges could be for services provided by any one or more of more than 2000 different third party service providers. Defendants claim the delivery of such services, and the concomitant billings for those services, are so wide-spread and diversified, that they cannot be considered as a "class" for any particular service or purpose. Moreover, while the services provided by the third party vendors may in and of themselves be widespread and diverse, the transportation services provided by Defendant itself is very limited, and in actuality is merely a "flow-through."

Because of this very limited role, Defendants claim they are not the source of, and they do not routinely receive, maintain, or have on file records or information that would or could demonstrate whether a specific third-party service was ordered or used by a customer, or any other information that could answer the question of whether or not a specific third-party charge was valid and/or authorized. For this same reason Defendants claim that, were UTO to be called upon to investigate the circumstances of how any specific third-party charge occurred, it would be necessary for UTO to somehow obtain such information from the clearinghouse and/or the third-party at issue, which Defendants claim is too onerous a job and not their responsibility.

Second, Defendants assert that most of the charges associated with its third party billing practices were "authorized" by its customers, and Plaintiffs are attempting to lump this "authorized" billing procedure in with some putative "unauthorized" billing procedures. Thus Defendants assert there are two distinct, unequal, and unrelated billing actions Plaintiffs are seeking to equate as being in the same class, when they are not.

Thirdly, Plaintiffs assert that the underlying third party contracts are all stand-alone and individual, and they vary so greatly in their individual terms, and conditions, to include specified amounts, reserves, compensations, and lengths of time, that they cannot possibly constitute one class. Defendants assert that the proposed class would include: (1) UTO customers who authorized, requested, and received the third party services for which they were charged; (2) customers who did not authorize, and who did not pay the third party charges they received; and (3) customers who have no objection to UTO delivering third-party charges to them as part of their bill for local telephone service, three different and distinct classes.

Fourth, Defendants assert Plaintiffs have not met their burden of proof, and they cannot demonstrate by a preponderance of the evidence, that such a class can be certified. Defendants claim Plaintiffs have ignored or misstated significant requirements under Civil Rule 23, that they have ignored the individual factual and legal issues inherent in their claims, and that they have not cited any pertinent case in which a class like the one they propose was able to be certified. Defendants take the position that Plaintiffs' claims cannot be resolved on a class wide basis because countless individualized inquiries, and mini-trials, as to each class member, would be required before the

Defendants' liability could be proven, and because any such attempt to litigate all class members' potential claims, at one time, would be unmanageable.

Lastly Defendants argue that the named Plaintiffs have suffered no monetary harm because they did not end up having to pay any of the disputed charges, no legal effort was ever made to collect them, and Plaintiffs have suffered no service interruptions or harm to their credit. Defendants assert Plaintiffs have suffered no physical, mental, or emotional injury, and no property damage from the charges which briefly appeared on their bills, but are now reversed out. No harm-no foul.

Defendants assert that the only alleged harm Plaintiffs could possibly identify was that where Mr. Stamm stated he had had to spend "time away" from other Pop Shop business to make telephone calls and send e-mails anent the disputed charges. Defendants further assert Plaintiffs can not identify or quantify any monetary or other harm associated with this "time away" from Pop Shop business.

Defendants assert the burden to show a "class" exists, and that it should be certified, "rests squarely on" Plaintiffs. To meet this burden, Defendants assert Plaintiffs must demonstrate, by a preponderance of the evidence, that all of the requirements of both Rule 23(A) and Rule 23(B) are satisfied.

Rule 23(A) requires Plaintiffs to prove that: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law and/or fact common to the class; (3) the claims or defenses of the named party are typical of the claims of the entire class; and (4) the named Plaintiffs would fairly and adequately protect the interests of the class.

Rule 23(B)(2) requires Plaintiffs to prove that:

(i) Plaintiffs are entitled to predominantly injunctive, as opposed to monetary, relief; and (ii) the class is sufficiently "cohesive" to justify class certification. Rule 23(B)(3) requires Plaintiffs to prove that: (i) common issues of fact and law "predominate" over any individual issues; and (ii) a class action would be superior to all other methods of resolving the disputes raised in their complaint and "manageable."

Defendants claim Plaintiffs will never be able to carry their burden of proof, under Rule 23, because of the variability of the interest of each potential member of the proposed class.

Plaintiffs in Reply claim that Defendants have either misstated or misunderstood the nature of the class they are seeking to certify. Plaintiffs' claim that the proposed class should be defined as: "All individuals, business or other entities in the State of Ohio who are or who were within the past four years [local telephone customers of UTO and] who were billed for charges on their local telephone bills on behalf of third parties without their permission."

Plaintiffs further point out that a Judge has "broad discretion," and that in this case that discretion should mitigate in favor of class certification. In support of this position Plaintiffs argue:

1. There are "common questions of Law and Fact;"

2. Specific defenses would, "not preclude resolution of the case on a class-wide basis;"

3. Defendants' attempt to "manufacture individualized issues," is not compelling nor a bar to class certification;

4. Resolution of the underlying wrong by class certification is the only realistic manner in which it can be done;

5. The "claims" of the proposed, "class" are cohesive and suitable for injunctive relief;

6. All proposed Plaintiffs, "have suffered identical injuries as those suffered by the members of the class."

Plaintiffs have also sought to introduce as recently decided "supplemental authority," the case of Ritt v. Billy Blanks Ents., 171 O.App. 3d 204 (2007). Defendants have sought an Order to strike the introduction of this additional authority.

The Court has reviewed the Ritt case, and the Memorandums. The Ritt case appears to be authoritative and enlightening. Defendants' Motion to Strike does not appear to be in the interest of justice, and it is overruled.

IT IS SO ORDERED.

The Ritt case appears to deal with the issue of whether each member of the potential class "authorized" the charges challenged, and with so many members being involved, any attempt of a resolution would kick off a number of "mini-trials" and procedures. As stated by the Court in Ritt,

"The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.

A Plaintiff must prove by a preponderance of the evidence that class certification is appropriate. Any doubts a trial court may have as to whether the elements of class certification have been met should be resolved in favor of upholding the class."

That language appears to address the situation presently before the Court.

In considering the facts, the law, and the arguments of counsel, it appears to the Court that Plaintiffs' various Motions for Class Certification, and for the right to be the Class Representative, and for Plaintiffs' counsel to be designated as counsel for the Class, are in the interest of justice, and they should and ought to be GRANTED. Now therefore,

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IT IS SO ORDERED. Defendants' EXCEPTION IS NOTED.

THIS IS AN APPEALABLE ORDER.

Hon. James E. Barber

cc: Dennis Murray, Sr., Esq.
Donna Jean Evans, Esq.
Michael Farrell, Esq.
Karl Fanter, Esq.